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Regulatory
Town Hall

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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) citation	6 VAC 40-50-10 et seq.
Regulation title	Regulations for the Approval of Marijuana Field Tests for Detection of Marijuana Plant Material
Action title	Promulgation of new regulation
Date this document prepared	6-2-06

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.*
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.*

1) These regulations qualify as emergency regulations under Code § 2.2-4011(A)(ii) because Virginia statutory law (an amendment to Code § 19.2-188.1) requires them to be effective within 280 days or less from its enactment.

2) This is a new regulation. The key provisions are as follow:

6 VAC 40-50-30. Request for Approval. This section explains how manufacturers can submit a marijuana field test for approval.

6 VAC 40-50-40. Notice of Approval. This section describes how the Department will notify manufacturers whether their kit has been approved.

6 VAC 40-50-60. Publication. This section notifies the public where the list of approved marijuana field tests will be published.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

During its 2006 Session, the General Assembly amended Virginia Code § 19.2-188.1 to require the Department to approve marijuana field tests for use by law-enforcement officers to enable them to testify to the results obtained in any trial for a violation of § 18.2-250.1 regarding whether or not any plant material, the identity of which is at issue, is marijuana. The amendment to § 19.2-188.1 further specifies that the Department shall approve those marijuana field tests deemed accurate and reliable pursuant to regulations adopted in accordance with the Administrative Process Act. (2006 Va. Acts. c. 447).

Pursuant to Virginia Code § 9.1-1110, the Forensic Science Board shall adopt regulations for any provisions of the Code as they relate to the responsibilities of the Department. At its May 10, 2006 meeting, the Forensic Science Board approved these proposed regulations.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

These new regulations establish the process of approval, approval authority, criteria for approval, notification methods, fee assessment, and publication procedures associated with marijuana field tests or marijuana field test kits submitted by manufacturers to the Department.

Effective July 1, 2006, Virginia Code § 19.2-188.1(B) will permit law enforcement officers to testify at trial for simple possession of marijuana cases to the results of field tests regarding whether or not any plant material, the identity of which is at issue, is marijuana. In accordance with § 19.2-188.1(B), officers may only testify to the results of kits deemed accurate and reliable by the Department pursuant to regulations adopted in accordance with the Administrative Process Act. These regulations establish the process the Department will follow for approving kits and describe where law enforcement agencies can find the list of approved kits. Without these regulations, there would be no approved marijuana field tests for use by law enforcement.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

By amending Code § 19.2-188.1 to allow law enforcement officers to testify to the results of marijuana field tests, the General Assembly determined that such an action would assist officers as they strive to protect the health, safety and welfare of Virginia's citizens. The proposed regulations are necessary to fulfill the General Assembly's mandate.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

This is a new regulation. The substantive provisions are as follows:

6 VAC 40-50-10. Definitions.

6 VAC 40-50-20. Authority for approval.

6 VAC 40-50-30. Request for approval.

6 VAC 40-50-40. Notice of approval.

6 VAC 40-50-50. Maintenance of approved status.

6 VAC 40-50-60. Publication.

6 VAC 40-50-70. Liability.

6 VAC 40-50-80. Fees.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives to these regulations.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The agency/board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so at the public meeting or by submitting them to Katya Herndon by mail at Department of Forensic Science, 700 N. 5th Street, Richmond, VA 23219, by email to katya.herndon@dfs.virginia.gov, or by fax at (804)786-6857. For questions, Ms. Herndon may be reached by phone at (804) 786-6848. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public meeting will be held and, once available, notice of the meeting date can be found in the Calendar of Events section of the Virginia Register of Regulations as well as on the Town Hall website. Both oral and written comments may be submitted at that time.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency/board will use the participatory approach to develop a proposal if it receives at least 10 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting the agency use the participatory approach and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage

economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no family impact.